

Office of the Presiding Officer
Military Commission

8 September 2005

SUBJECT: Presiding Officers Memorandum (POM) # 7-1 Access to Evidence, Discovery, and Notice Provisions

This POM supersedes POM 7 dated 12 August 2004. POM 7 was titled “Access to Evidence and Notice Provisions”

1. One of the many components of a fair, full, and efficient trial is that the parties are able to obtain adequate and timely access to evidence; which flows from compliance with notice requirements of Commission Law and compliance with discovery and other orders from the Presiding Officer.. Failure to comply with notice requirements and orders can result in parties being unable to properly prepare their cases, unnecessary delays in the trial, and sanctions by the Presiding Officer.

2. Commission Law contains many provisions concerning access to evidence, time frames, notice, and the like. This POM is not intended to restate Commission Law; parties are responsible for complying with Commission Law requirements. This POM:

a. Establishes procedures for counsel to obtain a ruling from the Presiding Officer if they believe the opposing party has not complied with discovery, notice or an access to evidence requirement.

b. Does not address requests for witnesses (See POM # 10) or “investigative or other resources” as that term is used in Military Commission Order # 1.

c. Does not modify those procedures established by Commission Law with respect to Protected Information.

d. Does not modify, circumvent, or otherwise alter any law, rules, directives, or regulations concerning the handling of classified information.

3. Discovery Orders. At the appropriate time in the trial process, the Presiding Officer will issue a Discovery Order. A sample is enclosed which will be modified to fit each particular case. Such an order may be issued even though discovery and access to evidence may already be underway.

4. Basic principles:

a. When parties comply with discovery orders and notice and access to evidence requirements, the discovery, notice, and access to evidence process will not ordinarily require the Presiding Officer's involvement.

b. The Presiding Officer and the Assistant should NOT be involved in the routine process of a party's compliance with discovery orders or notice or access to evidence requirements. The parties should provide such access, evidence or notice in the manner required, and at the time required, as set out in Commission Law, POMs, discovery orders, or other orders of the Presiding Officer. There is ordinarily no reason for the Presiding Officer or the Assistant to receive copies of information that is the subject of discovery, notice, or access to evidence requirements, unless a dispute arises as to whether a party is entitled to discovery, notice, or access.

c. To avoid unnecessary disputes at trial concerning whether discovery has been complied with or access or required notice has been given, the parties should have procedures to ensure they are able to demonstrate compliance with those requirements. It is advisable for the parties to prepare lists of what is or already has already been provided - and how and when that was done - if this has not been done already. Such lists, if any, should not be provided to the Presiding Officer or the Assistant unless specifically requested. Such lists should be brought to any session of the Commission.

4. Time frames. The time frames for discovery, access to evidence and notice shall be as prescribed by the Presiding Officer through POMs, discovery orders, or other orders of the Presiding Officer. In the absence of orders by the Presiding Officer, Commission Law shall govern.

5. Presiding Officer availability to resolve access to evidence issues.

a. The Presiding Officer is available to resolve access to evidence, discovery, and required notice issues. This POM should not, however, be interpreted as a replacement for the usual professional courtesy of working with opposing counsel to resolve issues. For example, in the case of a request for information, access to evidence, or missed notification, it is professionally courteous to ask opposing counsel to provide the evidence, access or notice before requesting the Presiding Officer for relief. When such attempts have been tried without success, or counsel believes that a further request will be unproductive, this POM provides the procedure that will be used.

b. Counsel should immediately request the Presiding Officer's assistance in the following situations as soon as it appears to counsel that any of the following occurred and working with opposing counsel has been reasonably tried and has failed:

(1). A notice requirement was due, and the notice has not been given, despite a reminder.

(2). Access to evidence was required, and the access was not given, despite a reminder.

(3). Access was requested and denied by the opposing party.

(4). A party failed to provide information or access required by a discovery order despite a reminder.

c. When any of the situations listed in paragraph 7b, or other issues involving discovery, required notice, or access to evidence arise, the party will prepare a special request for relief using the procedures established in POM # 4-2 but using format as below for the attachment. The email request to the Presiding Officer, cc'ing the Assistant, all opposing counsel, and the Chief Prosecution and Defense Counsel shall contain the information in the format below. Each request shall be the subject of a single email with a helpfully descriptive subject line and contain the following as a minimum. Such requests will become part of the filings inventory.

(1). Style of the case and name of the request.

(2). One of the following as the case may be:

(a). If notice was due and not given, cite the requirement for the notice, when it was due, efforts to obtain notice, and that notice was not received when due.

(b). If an item, matter, or access was supposed to be provided pursuant to a discovery order, cite the specific provision in the discovery order requiring same, that access or the matter was not provided when due, and efforts to obtain compliance

(c). If a party was required to give access pursuant to Commission Law or other law or order (other than a discovery order) and did not, cite the requirement for the access, when it was due, efforts to have opposing counsel provide the access, why requesting counsel believes the requested evidence is necessary and reasonably available, and that access was not provided when due.

(d). If counsel requested access (other than pursuant to a discovery order) and access was denied, cite the authority that requires opposing counsel to provide access, when it was requested, efforts to have opposing counsel provide the access, why requesting counsel believes the requested evidence is necessary and reasonably available, and that access was not provided when due.

Original Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer

1 Enclosure

Enclosure 1 to POM 7-1, Sample Discovery Order

UNITED STATES OF AMERICA

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ORDER

DATE

I. The Presiding Officer is aware that the discovery process - though perhaps not by that name - has been ongoing since at least 2004; in other words, parties have been sharing matters that might be used to prepare for trial or at trial. The Presiding Officer finds that to ensure a full and fair trial and to ensure that certain matters are not overlooked while the parties continue to share information, the following ORDER is necessary.

II. This Order does not relieve any party of any requirement to disclose those matters that Commission Law requires to be disclosed. Where this Order requires disclosure at times frames earlier than Commission Law provides, the Presiding Officer has determined that earlier disclosure is necessary for a full and fair trial.

III. All requirements of this Order are continuing in nature. The time frames set forth below apply to that information known to exist, or reasonably believed to exist, at the time this Order is issued. If information subject to this Order later becomes available that was not known, the party will disclose it as soon as practicable but not later than three duty days from learning that the information exists. In those cases when the item, or knowledge, becomes known after the date of this Order and the party is unable to obtain or produce it, the party shall give written (email) notice to opposing counsel of the nature of the item or knowledge and the time frame when it will be produced.

IV. Items that have already been provided need not be provided again if only to comply with this Order.

V. Listing the name of a witness in compliance with this discovery Order does not constitute a witness request. Witness requests must be made in accordance with POM #10.

VI. Neither the Presiding Officer nor the Assistant shall be provided with a copy of the items ordered to be produced. If counsel believe there has not been compliance with this order, or requests that additional information be provided, counsel should use the procedures in POM 4-2 or POM 7-1, as appropriate.

VII. Objections to the wording of this Order, or the authority to issue this Order.

a. If counsel need clarification on the wording or wish to suggest minor fine tuning - neither of which challenges the Presiding Officer's authority to issue a discovery order - the party will send the Presiding Officer, the Assistant, and opposing counsel an email NLT _____ with the suggestions in the body of the email.

b. Counsel who object to the Presiding Officer's authority to issue a discovery order, or request modification other than clarification or fine-tuning, shall file a motion in accordance with POM 4-2 NLT _____.

VIII. Failure to adhere to the terms of this Order may result in the imposition of those sanctions which the Presiding Officer determines are necessary for a full and fair trial.

IX. If any matter that this Order, or Commission Law, requires to be disclosed was in its original state in a language other than English, and the party making the disclosure has translated it, has arranged for its translation, or is aware that it has been translated into English from its original language, that party shall also disclose a copy of the English translation along with a copy of the original untranslated document, recording, or other media in which the item was created, recorded, or produced.

X. Each of the disclosure requirements shall be interpreted as a requirement to provide the item, preferably in electronic form, to opposing counsel. When disclosure is impracticable because of the nature of the item (a physical object, for example) or is protected or classified so that transmission or delivery of the item is impractical or prohibited, the party shall permit the opposing counsel to inspect the item in lieu of providing it.

XI. A party complies with this order when the lead counsel for a party - or another counsel designated by the lead counsel - has been provided with the item or permitted to inspect it. Counsel may, but are not required to, provide more than one copy of the items required by this Order.

XII. As used in this order, the term "at trial" means during the party's case in chief, whether on merits or during sentencing. Matters to be disclosed which relate solely to sentencing will be so identified.

XIII. Nothing in this Order shall be interpreted to require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's trial assistants.

XIV. With the exception of item XIVa, the prosecution shall provide to the defense the items listed below not later than _____ calendar days after the date of this Order.

a. Not later than 3 calendar days of the date of this Order, the name of the counsel or trial assistant who shall receive the matters required to be disclosed or provided by this Order on behalf of the Prosecution.

b. Evidence and copies of all information the prosecution intends to offer at trial.

c. The names and contact information of all witnesses the prosecution intends to call at trial along with the subject matter of the witness' testimony.

d. As to any expert witness or any expert opinion the prosecution intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and the essence of the opinion that the witness is expected to give.

e. Evidence that tends to exculpate the accused, or which is directly relevant to the accused's receiving a lenient sentence should sentencing become necessary.

f. Statements of the accused in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, that:

1. The prosecution intends to offer at trial whether signed, recorded, written, sworn, unsworn, or oral, and without regard to whom the statement was made.

2. Were sworn to, or written or signed by the accused whether or not to be offered at trial, that is relevant to any offense charged.

3. Were made by the accused to a person the accused knew to be a law enforcement officer of the United States, whether or not to be offered at trial, that are relevant to any offense charged.

g. Prior statements of witnesses the prosecution intends to call at trial, in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, and relevant to the issues about which the witness is to testify that:

1. Were sworn to, or written or signed by, the witness.

2. Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

XV. With the exception of item XVa, the Defense shall provide to the Prosecution the items listed below not later than _____ calendar days after the date of this Order. These provisions shall not require the defense to disclose any statement made by the accused, or to provide notice whether the accused shall be called as a witness.

a. Not later than 3 calendar days of the date of this Order, The name of the counsel or trial assistant who shall receive the matters required to be disclosed or provided by this Order on behalf of the Defense.

b. Evidence and copies of all information the defense intends to offer at trial.

c. The names and contact information of all witnesses the defense intends to call at trial along with the subject matter of the witness' testimony.

d. As to any expert witness or any expert opinion the defense intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and the essence of the opinion that the witness is expected to give.

e. Prior statements of witnesses the defense intends to call at trial, in the possession or control of the defense counsel, or known by the defense counsel to exist, and relevant to the issues about which the witness is to testify that:

1. Were sworn to, or written or signed by, the witness.

2. Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

f. Notice to the Prosecution of any intent to raise an affirmative defense to any charge. An affirmative defense is any defense which provides a defense without negating an essential element of the crime charge including, but not limited to, alibi, lack of mental responsibility, diminished capacity, partial lack of mental responsibility, accident, duress, mistake of fact, abandonment or withdrawal with respect to an attempt or conspiracy, entrapment, accident, obedience to orders, and self-defense. Inclusion of a defense above is not an indication that such a defense is recognizable in a Military Commission, and if it is, that it is an affirmative defense to any or a particular offense.

g. In the case of the defense of alibi, the defense shall disclose the place or places at which the defense claims the accused to have been at the time of the alleged offense.

h. Notice to the prosecution of the intent to raise or question whether the accused is competent to stand trial.

IT IS SO ORDERED.

Peter E. Brownback III
COL, JA, USA
Presiding Officer